No. 14,856

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM RICHARDS, CLANCY HENKINS, JOSEPH L. RIEDI, ROBERT S. SCHY and LOIS LANE,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and DOUGLAS INDEPENDENT SCHOOL DISTRICT, to be known as Juneau-Douglas Independent School District,

Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEE.

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FACTS.

Counsel for appellants has made a detailed statement of the facts involved in this case in his statement of the case appearing on pages 3 to 13 of appellants' brief. It would therefore be superfluous to repeat the detailed information contained in appellants' statement.

This case arises from an order of the District Court consolidating the Juneau Independent School District and the Douglas Independent School District. The order was entered after an election duly held in both of said districts. This election resulted in a vote in the Juneau Independent School District of 702 votes for consolidation and 239 votes against consolidation; and a vote in the Douglas Independent School District of 274 votes for consolidation and 209 votes against consolidation. See Tr. 24. Thereafter, the Honorable George W. Folta, Judge of the District Court for the District of Alaska, Division Number One at Juneau, entered an order consolidating said school districts, which order was signed on March 18, 1955.

Appellants, who are residents of the City of Douglas and of the portion of the Douglas Independent School District lying outside the corporate boundaries of the City of Douglas, Alaska, filed petitions for leave to appear by motion and for an order revoking the consolidation of the school districts.

The reasons set forth for revoking the consolidation of the districts which have been relied upon on this appeal according to appellants' brief may be summarized as follows:

Appellants contend that the form of ballot was not in accordance with the statutory requirements contained in Chapter 93, SLA 1953; that the form of ballot contained two proposals and thus was defective; that the ballot was contingent upon the City of Douglas amending its sales tax ordinance, and that the City of Douglas could not legally so amend its sales

tax ordinance. The petitions filed by appellants in the District Court did not include most of these grounds now presented upon appeal. The learned trial court, after hearing arguments by the appellants and appellee, denied appellants' petitions to set aside the order consolidating the school districts. This appeal has been taken from that order denying appellants' petitions.

I.

APPELLANTS HAVE NO RIGHT, IN THE MANNER HEREBY ATTEMPTED, TO CONTEST THE ELECTION WHEREBY THE SCHOOL DISTRICTS WERE CONSOLIDATED.

Appellants filed petitions after an order had been entered by the District Court for the District of Alaska consolidating the Juneau and Douglas Independent School Districts. By their petitions appellants sought to have the order consolidating the school districts set aside, based primarily upon allegations pertaining to supposed irregularities or illegalities in the form of ballot. In effect, appellants plead that legal fraud was perpetrated upon the voters who, by a substantial majority in both of the school districts, indicated their desire to have the districts consolidated.

> "The right to contest an election is not a common law right. Elections belong to the political branch of the government and are beyond the control of the judicial power. In the absence of any statutory proceeding the only remedy in the nature of an election contest known to the common law

is quo warranto, or in modern practice an information in the nature of quo warranto."

29 *C.J.S.*, Sec. 246, page 355.

Alaska has abolished the writ of quo warranto and proceedings by information in the nature of quo warranto, specifying that the proceedings previously obtainable under those forms may be obtained by a statutory action set forth in Section 56-4-2, ACLA 1949. See Section 56-4-1, ACLA 1949.

Section 56-4-2 specifies as follows:

"*Action against public or private corporation on ground of fraud or concealment: Direction by Governor.* An action may be maintained in the name of the United States, whenever the governor shall so direct, against a corporation either public or private, for the purpose of avoiding the act of incorporation, or the act renewing or modifying its corporate existence, on the ground that such act or either of them was procured upon some fraudulent suggestion or concealment of a material fact by the persons incorporated, or some of them, or with their knowledge and consent; or for annulling the existence of such corporation, when the same has been formed under any general law operating in this Territory therefor, on the ground that such incorporation, or any renewal or modification thereof, was procured in like manner."

This section clearly sets forth the remedy available to citizens who feel that a modification of corporations has been procured by fraudulent suggestion or concealment of a material fact such as by setting forth

propositions in a ballot in a misleading form as contended by appellants.

> "Under statutes providing for election contest, the right, as well as the procedure to be followed, is purely statutory, and strict compliance with the statute is necessary."
>
> 29 *C.J.S.,* Sec. 247, page 355.

It is to be noted that the action provided for in the Alaska act must be maintained in the name of the United States under direction of the Governor or the Territory of Alaska. This is the only procedure by which an election such as that which resulted in the consolidation of the Douglas and Juneau Independent School Districts may be contested.

Thus in the case of *Rister v. Plowman,* Court of Civil App., Tex., 98 S.W. 2d 264, an election was held for consolidation of school districts. Upon such consolidation being declared, the trustees of one of the districts sued the trustees of the other district and the County School Board, contesting the election. A statute required that either the county attorney or the officer who declares the official result of an election be made a party in any contest of an election. The court held that naming such parties in compliance with the statute was a prerequisite to the jurisdiction of the court to determine an election contest.

Similarly, in the case of *Village of Metamora v. Village of Eureka, et al.,* (Supreme Court of Ill.), 45 N.E. 209, an election was held to change the county seat from Metamora to Eureka. The Illinois statute for contesting an election required that the county be

made a party defendant. The court held that failure to make the county a defendant required dismissal of the contest.

In the case of *State ex rel. Daugherty v. County Court of Lincoln,* 127 W. Va. 35, 31 S.E. 2d 321, 323, the unsuccessful candidate in an election for a judgeship made a motion to the County Court to hear a contest of the votes cast. Daugherty, the successful candidate, objected on the grounds that the court had no jurisdiction. The County Court overruled this objection and Daugherty applied to the Supreme Court for a writ of prohibition. The Supreme Court held:

> "An election contest is purely a constitutional or statutory proceeding. The common law knew no such method of testing the validity of a nomination or election. 29 C.J.S., Elections, Sec. 246. Our constitution confers on County Courts jurisdiction to hear and determine contests in strictly limited cases . . .
>
> "The County Court, having no inherent or common law authority to conduct a contest for any kind of office, and having no such authority conferred upon it by the constitution or by statute to hear such contest . . . is, of course, barren of such power."

As stated in 18 *Am. Jur.,* Sec. 284, jurisdiction to hear and determine election contests is dependent upon and regulated by statutory provision. See *Cahill v. McDowell,* 40 N.D. 625, 169 N.W. 499; *State ex rel. Fawcett v. Superior Court,* 14 Wash. 604, 45 P. 23; *Cundiff v. Jeter,* 172 Va. 470, 2 S.E. 2d 436; *Johnson v. Stevenson,* 170 F. 2d 108 (C.C.A. 5), cert. den. 336

U.S. 904, 93 L.Ed. 1069; *Sigsbee v. Birmingham,* 157 Ala. 418, 47 So. 1036. The appellants in the subject case have not followed the Alaska statutory procedure to contest an election and, accordingly, it is respectfully submitted that their appeal from the order of the District Court denying their petition should be dismissed.

II.

THE ELECTION WHEREBY THE JUNEAU AND DOUGLAS INDEPENDENT SCHOOL DISTRICTS WERE CONSOLIDATED WAS EXPRESSLY AUTHORIZED BY STATUTE.

Learned counsel for appellants contends that the election held for the purpose of determining whether the voters in the Juneau and Douglas Independent School Districts desired consolidation was not authorized by statute. Chap. 93, SLA 1953, expressly provides for an election in order to determine whether two independent school districts shall be consolidated.

Counsel incorrectly states that this statute "provided that the ballot to be submitted must give the electorate a right to vote 'For Consolidation' or 'Against Consolidation'." There is no such provision in the act which merely states that the judge of the District Court shall order an election in each of said independent school districts "for the purpose of determining whether the people desire such consolidation . . ." See Section 3(b), Chap. 93, SLA 1953. No exact form of ballot is prescribed by Chap. 93, SLA 1953, and the form of ballot actually used in the elec-

tion clearly indicated the desire of a substantial majority in each independent school district as well as a substantial majority of all the voters to have the districts consolidated.

It is true that there is information contained in the proposal which clarified the tax situation which would result upon the consolidation being effected. The voters, however, were asked to vote on one proposition and one proposition only, namely, whether they were "For Consolidation" or "Against Consolidation".

There can be no question but that the election was held under express statutory authority. The question as to whether the form of ballot as used in the election was a proper form of ballot will be discussed at length in the next sections of this brief. It appears that counsel's objection actually goes to the form of ballot rather than to the statutory authority for the election.

III.

THE QUESTION OF THE FORM OF BALLOT USED IN THE ELECTION IS NOT PROPERLY BEFORE THIS COURT.

Counsel contends in his brief that the form of ballot used in the election combined two propositions into one and failed to give the voter an opportunity to express himself clearly for or against the proposition submitted. At the outset it is to be noted that no mention was made of any such defect in the statement of points upon which this appeal was taken, although the speci-

fications alleged that the ballots did not conform to the laws of the Territory of Alaska. (See Tr. 61 and 65.)

Moreover, these contentions pertaining to alleged defects in the form of ballot were nowhere set forth in appellants' "Petition for Leave to Appear by Motion and For an Order to Alter and Amend the Judgment and Order Herein and For New Trial and Hearing," the only pleading presented to the court below. Having failed to present these issues to the District Court, and having failed to set them forth in their statement of points, appellants are precluded from raising the issues at this time. See *Western National Ins. Co. v. LeClare,* 163 F. 2d 337, wherein this honorable court stated:

> "Three points argued by appellant were that the evidence is neither clear nor convincing; that it does not show Raymond's authority to enter into an oral contract for or on behalf of appellant; and that it does not show Mr. LeClare's authority to act for or on behalf of appellee. These points were not stated in appellant's statement of points and hence need not be considered by us."

In the case of *Northwestern Steamship Co. v. Cochran,* 191 F. 146, involving an appeal from the United States District Court for the District of Alaska to this honorable court, it was stated:

> "The defense that the plaintiff was not the real party in interest was not made in the pleadings, nor was it suggested in the court below. The objection 'that plaintiff is not the real party in interest, and hence has no right to sue, comes too late when made for the first time in the appellate court.' "

To the same effect it was stated in *DeJohn et al. v. Alaska Matanuska Coal Co. et al., Agostino v. Same,* 41 F. 2d 612:

> "There is some contention here by Agostino that he is entitled to the funds, or a part of the funds, in the receiver's hands, but that question was not properly in issue in the trial court, was not there decided, and hence is not before us."

Appellants, having failed to plead or argue in the court below that the form of ballot was defective as combining more than one proposition and as failing to give the voter an opportunity to express himself clearly for or against the proposition submitted, and having failed to set forth these points in their statement of points relied upon, the matter is not properly before this court and should not be considered on this appeal.

IV.

A PROPER FORM OF BALLOT WAS USED IN THE ELECTION.

Although appellee feels that the question as to the form of the ballot is not properly before this honorable court, it is nevertheless respectfully submitted that the form of ballot was adequate. It is to be noted at the outset that this is an attempt to contest an election after the completion of the election and the entry of an order consolidating the school districts. Under those circumstances it is well established that minor irregularities will not invalidate an election. An election, after its completion, will not be held void

unless it is clearly illegal and courts generally sustain elections authorized by law if it has been so conducted as to give a free and fair expression of the popular will. See 29 *C.J.S.*, Elections, Sec. 214.

As discussed above, Chap. 93, the statute authorizing this election, makes no provision as to the form of ballot to be used. The judge of the District Court in ordering the election required that the judges of election provide "a form of printed or written ballot suitable for determining the question of whether the voters in each of said districts are in favor of or against the consolidation of said districts . . ." See Tr., page 15. The judges of election under this authorization provided for the following form of ballot:

"Proposal

"Shall the Juneau Independent School District and the Douglas Independent School District be consolidated under the name of Juneau-Douglas Independent School District, in which event the ordinances of the Juneau Independent School District, being the larger of said school districts according to the number of registered voters at the last general election held therein, shall be in effect in such consolidated school district, including the ordinance providing for a 1% tax on retail sales and services, which tax shall automatically become effective in that portion of the Douglas Independent School District located beyond the corporate limits of the City of Douglas, Alaska, upon entry of an order by the District Court consolidating said school districts. In the event of the approval of this proposal by a majority of the

voters of each of said school districts, the order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax.

"Each ballot shall set forth the above proposition preceded by the instructions:

'Vote for or against the following proposal by placing an "X" in the appropriate box,' and followed by the words:

For Consolidation ☐
Against Consolidation ☐"

Any reading of this ballot clearly indicates that there was but one proposal set forth therein, namely, whether or not the voters were "For Consolidation" of the Juneau Independent School District and the Douglas Independent School District, or "Against Consolidation." The additional information set forth in the proposal pertains to the result which would follow as a matter of law in the event that the consolidation took place. At the time of the election there was in effect in the portion of the Juneau Independent School District lying outside the corporate boundaries of the City of Juneau a sales and service tax of 1%, the proceeds of which were being used for specified school purposes. The City of Juneau had theretofore authorized one-half of its 2% retail sales and service tax to be used for the same school purposes so that

there was a uniform 1% sales and service tax in effect throughout the Juneau Independent School District for specified school purposes at the time of the election.

The Organic Act of the Territory of Alaska specifies:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws . . ." See Sec. 48-1-1, ACLA 1949, 48 U.S.C., Sec. 78, Act of Aug. 24, 1912, Chap. 387, Sec. 9; 37 Stat. 514; as amended by Act of June 3, 1948, Chap. 396; 62 Stat. 302.

It thus was required that, upon the consolidation of the two school districts, taxes be uniform upon the same class of subjects. Chap. 93 specifies that, upon consolidation, the ordinances of the larger of the two districts, according to the number of registered voters at the last general election, would become applicable to the consolidated district. See Sec. 8, Chap. 93, SLA 1953. There was still some question due to the fiscal autonomy of municipalities under Alaska law as to whether the sales tax ordinance would automatically become effective within the corporate boundaries of the City of Douglas, which city was within the boundaries of the Douglas Independent School District. The City of Douglas had previously, by referendum vote, approved the following proposal:

> "*Proposal:* Shall the City of Douglas, Alaska, increase the consumer's sales tax, as now levied by Ordinance No. 34 of said City, from 1% to 2% on the sales price of all retail sales, rents

> and services made within the City, the additional 1% tax to be used exclusively for school purposes?"

It thus was within the power of the Common Council of the City of Douglas to authorize the use of the proceeds from a 1% sales tax for the same school purposes as the similar tax which was being levied in the Juneau Independent School District. To obviate any possibility of conflict, the Common Council of the City of Douglas passed its Resolution 201, set forth in the supplemental transcript of record at pages 74 and 75, agreeing to amend its sales tax ordinance so as to provide for the use of the funds for the same purposes as the funds collected under the Juneau Independent School District sales tax ordinance.

It obviously was fair to the voters, particularly to the voters of the Douglas Independent School District, to advise them that, in voting for consolidation, they would become subject to such a tax. Accordingly, this fact was set forth in the proposal. Far from misleading anyone, this additional information clarified the effects of the consolidation so that all voters were properly advised thereof.

The great weight of authority holds that elections held upon similar ballots are valid. Thus in the case of *State v. Osbourne,* decided by the Supreme Court of Oregon on May 12, 1936 and reported in 57 P. 2d 1083, a ballot was provided for an amendment to the state constitution in order to allow verdicts by ten member juries in all cases except first degree murder. The proposition was presented to the voters as

> "Criminal Trial Without Jury and Nonunanimous Verdict. Constitutional Amendment.—Purpose: To provide by constitutional amendment that in criminal trials any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise. Vote Yes or No."

Actually the voters had previously approved the right to waive trial by jury. The court held that the coupling of this provision with the provision pertaining to the ten member findings did not defeat the election, stating:

> "We think that there was surplusage in the ballot title, but such surplusage was not of such a character as to mislead or deceive. The title was not absolutely accurate.
>
> "Neither a lack of absolute precision nor the use of surplusage will vitiate the election.
>
> "It is true that the ballot title does not reflect the fact that a trial without a jury upon waiver thereof by defendant had been prescribed by the amendment of November 8, 1932, and that such amendment was effective when the amendment in suit was submitted to the electorate. The criticism is that the ballot title indicates that both the 'trial without jury' and the 'ten juror verdict' amendments were being submitted, while, in fact, the first of these two amendments had already become part of the Constitution."

In *Yowell v. Mace* (Mo.), 290 S.W. 96, the court considered an election held according to a statute which provided:

> "There shall be written or printed on each ballot voted at said election either of the following sentences: 'For enforcing the law restraining (insert the name of animals in petition) from running at large;' 'against enforcing the law restraining (insert the name of animals in petition) from running at large.' "

Actually at the general election the proposition was set forth at the foot of each of the seven party tickets in the following manner:

> "☐ For enforcing the law restraining horses and mules, asses, cattle, goats, swine and sheep from running at large. Yes.
>
> ☐ For enforcing the law restraining horses and mules, asses, cattle, goats, swine and sheep from running at large. No."

The court held that the statute setting forth the type of ballot nowhere prescribed what would be the result of failure to use the form of ballot provided by the statute and that, under these circumstances, the statute would be regarded as directory rather than mandatory, stating:

> "From these authorities it is quite clear that the statute here involved is directory merely, and, unless the ballot be in such form as to prevent a free expression of the voter's will, it should not be cause for holding the election invalid. Under the facts with which we are confronted, there is no

reason to believe the voter could have been misled or confused by the ballot used."

In *Williamston Graded Free School District v. Webb,* 89 Ky. 264, 12 S.W. 298, a proposition was presented to the voters as to whether a tax should be levied for establishment and support of a school district. It was held that this was sufficient compliance with the statute requiring a submission of the question of whether such a school district should be established. The adding of the provision pertaining to the levying of a tax for the support of the district was considered as surplusage, in no manner invalidating the election, the court holding:

". . . submission of a proper proposition is not invalidated by the inclusion of a further matter on which the voters know they have no authority to pass or take action."

In *State v. Stouffer* (Mo.), 197 S.W. 248, an election was held to determine whether the voters desired consolidation of school districts. The statute required that the ballots contain a proposition "For Organization" or "Against Organization". The ballots actually used contained the wording "For Consolidation" and "Against Consolidation". This was held a sufficient compliance with the statute.

In *Critten v. New* (Mo.), 212 S.W. 46, the proposition for consolidation of districts was set forth as follows:

"Do you favor the consolidation of the two old districts into a new one, the schoolhouse of the latter to be centrally located on the public road?"

The court held:

> "Indeed, strictly speaking, the selection of a site was not before the two old school districts, and what plaintiffs claim to be two propositions was simply one, namely, should the two districts be consolidated into one district with the school to be located in the center of the district and on the public highway . . . We do not see how that the provision that the schoolhouse, if the consolidation was effected, should be centrally located and on a public road, rendered the proposition to consolidate, or the vote thereon invalid, especially as that is the location which the statute favors."

Similarly in the case at bar, it is difficult to see how the provision that the same sales tax be effected throughout the consolidated district, in the event of consolidation, could render the proposition to consolidate or the vote thereon invalid, especially as the Organic Act provisions for uniformity in taxation requires that the sales tax be applicable throughout the consolidated district.

An annotation on a subject closely related to the issues raised by counsel for appellants pertaining to the matter contained in the ballots is to be found in 122 A.L.R. 1142. It is therein stated:

> "Although of course the extent and deceptive nature of any particular inclusion of extrinsic or foreign matter in a notice of a special election are largely determinative of the question whether such inclusion may be regarded as being so immaterial or harmless as not to affect the validity of the election, or as being so misleading as to vitiate the election, it may be noted that in practically all

> of the cases involving the point, the extraneous matter has been of a sort which has not been so objectionable as to mislead the voters, or at least has not been shown to have done so."

A number of cases are cited in this annotation, some of them involving inclusion of extraneous matter in the ballot and others involving the inclusion of matter in the notice of form of election. In all of the cases which are remotely similar to the facts involved in the case at bar, the elections were upheld.

In the case of *Brennan v. Black,* decided by the Supreme Court of Delaware April 27, 1954 and cited at 104 A. 2d 777, a statute provided for voting upon a ballot form as follows:

"For Additional Tax ☐
Against Additional Tax ☐"

Instead of the ballot being in the form prescribed by the statute, two separate ballots were used, one stating

"For Additional Tax ☐"

and the other ballot providing

"Against Additional Tax ☐"

It was held that the election should not be set aside on that ground.

Similarly, in *Sisco v. Caudle,* decided by the Supreme Court of Arkansas in 1947 and reported at 198 S.W. 2d 992, where a proposal for construction of a county hospital indicated that it was an "Initiated Act" which it was not, the court held that the validity of the election was not affected.

Counsel for appellants in his brief contends that it is not possible to determine what the voters desired in voting for the proposal contained in the Juneau-Douglas Independent School Districts consolidation election. It is respectfully submitted that no voter could have been deceived by the form of the proposal, and certainly no voter in the position of appellants could have been misled into voting for the proposal since the additional information contained in the ballot merely explained the resulting tax which would be involved to the voters of the Douglas Independent School District upon their voting in favor of consolidation. If anything, the additional material would have resulted in increasing the negative vote, and certainly those residents of the Douglas Independent School District who were opposed to consolidation can claim no prejudice as a result of the form of ballot.

V.

THE VALIDITY OF THE CITY OF DOUGLAS CONSUMER'S SALES TAX IS NOT PROPERLY BEFORE THIS COURT.

Counsel attempts to raise a collateral issue pertaining to the validity of the City of Douglas consumer's sales tax. There is no statement contained in the petitions filed by appellants with the District Court to the effect that the existing sales tax ordinance of the City of Douglas is invalid. This subject is being raised for the first time on this appeal. No mention of this point is made in appellants' statements of points. Under these circumstances it is respectfully submitted

that this issue should not be considered by this honorable court (see the authorities cited supra pertaining to the similar new contention of appellants in regard to the form of ballot under Section III of this brief).

Moreover, appellants have shown no particular danger of sustaining some direct injury which would justify this court's considering an attack on the validity of the City of Douglas sales tax ordinance. A similar situation was presented to this court in the case of *Sheldon v. Griffin*, 174 F. 2d 382 at 384, wherein it was stated:

> "There is nothing in the pleading or proof to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. To entitle himself to be heard he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people."

To the same effect is the case of *Frothingham v. Mellon,* 262 U.S. 447-488, 43 S.Ct. 597, 67 L.Ed. 1078, wherein it is stated:

> "The party who invokes the power (of the courts to declare a legislative enactment invalid) must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that

> he suffers in some indefinite way in common with people generally."

The reasons set forth above for the courts not intervening in regard to the validity of legislative enactments in the absence of a showing of special injury to the contest applies with equal force to the subject situation where a collateral attack is being attempted upon the validity of the sales tax ordinance of the City of Douglas.

VI.

THE CITY OF DOUGLAS SCHOOL SALES TAX IS VALID AND MAY BE AMENDED SO AS TO CONFORM TO THE JUNEAU INDEPENDENT SCHOOL DISTRICT AND CITY OF JUNEAU SALES TAXES.

It is true that the statute authorizing municipalities to pass consumer's sales taxes requires that a referendum be held and that a majority of the votes cast must be in the affirmative in order for an ordinance to be legally enacted. The statute specifies:

> "The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot." See Chap. 121, SLA 1953.

The District Court could well take judicial notice of the fact that the City of Douglas had an election on April 20, 1954, voting upon the following proposal:

> "*Proposal:* Shall the City of Douglas, Alaska, increase the consumer's sale tax, as now levied

> by Ordinance No. 34 of said City, from 1% to 2% on the sales price of all retail sales, rents and services made within the City, the additional 1% tax to be used exclusively for school purposes?"

and that the election resulted in 88 votes in favor of the proposal and 30 votes opposed to the proposal. Thereby the Common Council of the City of Douglas was duly authorized to enact a 1% sales tax for school purposes. Since the proposal voted upon at the consolidation election specified that the election be contingent upon the Common Council of the City of Douglas "amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax", and since the Juneau Independent School District tax is exclusively used for school purposes, there is no legal obstacle to the City of Douglas amending its ordinance in conformity with the authority given it by its voters in the referendum of April 20, 1954. The amended ordinance is well within the authorization granted by the voters. This honorable court may take judicial notice of the fact that a mandamus action is now pending in the United States District Court for the District of Alaska, Division Number One at Juneau, by the Juneau-Douglas Independent School District against the City of Douglas and its Common Council for the purpose of requiring the City of Douglas to enact such an amendment to its

sales tax ordinance and to apply half of the funds presently being collected under its 2% sales tax to the same school purposes as the similar tax being collected in the remaining portions of the Juneau-Douglas Independent School District.

It is true that the facts pertaining to the Douglas election of April 20, 1954 do not appear in the transcript of record on this appeal. It is submitted, however, that appellants, if they had any intention of contesting the validity of the tax on the basis of lack of authorization from the voters, should have pleaded specifically that no referendum was ever held in the City of Douglas authorizing enactment of a tax for school purposes. Such pleading has not been made and could not be made since the facts are as set forth above.

Counsel also argues that the authority given municipalities to enact sales tax ordinances, which authority was originally set forth in Chap. 38, SLA 1949, was in effect repealed by Chap. 47, SLA 1951. It is true that Chap. 47, SLA 1951, amended subsection 9 of section 16-1-35, ACLA 1949, as amended by Chap. 38, SLA 1949, by making a change pertaining to subsection (a) dealing with the general tax for school and municipal purposes. It is further true that this amendment omitted subsection (b), being the authorization for a consumer's sales tax. It is noted, however, that the title of Chap. 47, SLA 1951, makes no mention of repealing subsection 9(b), (the authorization for a consumer's sales tax). The title to the act reads as follows: "Amending subsection Ninth of

Sec. 16-1-35 ACLA 1949, as amended by Ch. 38 S.L.A. 1949, pertaining to a general tax for school and municipal purposes." The Organic Act of Alaska requires that "no law shall embrace more than one subject which shall be expressed in its title." See Section 4-3-1, ACLA 1949, 37 Stat. 514, 48 U.S.C., Sec. 76. The title to the act reveals that there was no intent to repeal the consumer's sales tax law, and it is quite clear that it was merely by inadvertence that subsection (b) was not set forth again in Chap. 47 of SLA 1951.

Moreover, the Douglas city sales tax, as far as the tax for school purposes is concerned, is not dependent upon the act in effect in 1951. As indicated above, the people of Douglas voted for a school sales tax in 1954 after the passage of Chap. 121, SLA 1953, which again set forth the authorization for a consumer's sales tax. The fact that the original Douglas consumer's sales tax was authorized by the voters and was passed in 1952 does not affect the right of the City of Douglas to enact a tax under the authorization granted in 1954. It appears to us that it should not be necessary to trace the tortuous course of Alaska sales tax legislation in this case as, for the reasons set forth in the section above, it is felt that this issue is not before this court at this time. In any event, it is respectfully submitted that the Common Council of the City of Douglas does have the authority, without any further referendum, to amend its sales tax ordinance so as to provide for uniform taxation throughout the Juneau-Douglas Independent School District.

The Common Council of the City of Douglas agreed so to amend its sales tax ordinance by Resolution 201 prior to the election and, as soon as this case is disposed of or as soon as a decision is rendered in the mandamus action now pending in the District Court, the contingency set forth in the ballot proposal should be satisfied.

Furthermore, the Common Council of the City of Douglas, having passed Resolution 201 and an election having taken place partially in reliance on that resolution and the school districts having been consolidated, it would appear that the Council is estopped from taking a contrary position. See *Getz v. City of Harvey,* 118 F.2d 817 (C.C.A. 7), wherein it is stated:

> "Where a city council has formally voted on a proposition, and there is no motion for reconsideration, the council may not reconsider its action if the rights of other persons have intervened."

CONCLUSION.

The learned trial court entered its order consolidating the Juneau and Douglas Independent School Districts on March 18, 1955, the order becoming effective on April 1, 1955. Since that time the two school districts have been administered as a consolidated district. Changes have been made in the construction of schools, number of teachers, finances, etc. Tremendous disruption and confusion would inevitably result from a reversal of the learned trial court's

denial of the appellants' petitions to set aside the order of consolidation, and it is respectfully submitted that such a decision should only be made in the event of the strongest of arguments. In the subject case appellants have shown no right to come before this court on this procedure to contest the election in view of the statutory method set forth by Alaska law in Sec. 56-4-2. The proposal upon which the voters by a substantial majority approved consolidation was set forth in a form which clearly permitted the voters to express their opinion. The objections now raised to the form of ballot were not properly brought before the court below or set forth in the statement of points relied upon in this appeal. It is respectfully submitted that appellants have presented no reason justifying the setting aside of the order of consolidation and that the prevailing legal reasons as well as public interest indicate that the decision of the trial court denying appellants' petitions be affirmed.

Dated, Juneau, Alaska,
February 3, 1956.

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